

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**CB Richard Ellis Memphis, LLC
Employer**

- and -

Case No. 2-RC-23287

**Local 94-94A-94B, International Union of
Operating Engineers, AFL-CIO
Petitioner**

DECISION AND DIRECTION OF ELECTION

CB Richard Ellis Memphis, LLC (“the Employer”) is engaged in the management of commercial real estate in the New York City metropolitan area, including a building located at 99 Tenth Avenue in Manhattan. Local 94-94A-94B, International Union of Operating Engineers, AFL-CIO (“the Petitioner”) filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, (“the Act”) seeking to represent a unit of all full-time and regular part-time maintenance mechanics employed by the Employer at 99 Tenth Avenue, New York, NY.

Upon a petition filed under Section 9(b) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter¹ and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated and I find that the Employer is a Tennessee corporation engaged in the management of commercial real estate in the New York City metropolitan area, including the building located at 99 Tenth Avenue, New York, New York, the sole facility involved in herein. Annually, the Employer derives gross revenues in excess of \$100,000, of which at least \$25,000 is derived

¹ The briefs filed by the parties have been duly considered.

from the Federal Drug Enforcement Administration (DEA) which purchases and receives good and provides services valued in excess of \$5,000 directly from points located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. The following unit is an appropriate unit within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time maintenance mechanics employed by the Employer at 99 Tenth Avenue, New York, NY.

Excluded: All other employees, including office clerical employees, guards, professional employees, and supervisors as defined in the Act.

The parties disagree on the eligibility of maintenance employee Rashiek Barber whom the Employer asserts is a supervisor within the meaning of Section 2(11) of the Act and hence properly excluded from the unit. That is the sole issue in this proceeding.

I have considered the evidence and the arguments presented by the parties regarding Mr. Barber's asserted supervisory status. As discussed below, I find that Mr. Barber is not a supervisor as defined by Section 2(11) of the Act and is thus properly included within the stipulated unit.

I. Employer's Operations at 99 Tenth Avenue

(A) Background

The Employer provides building maintenance services to commercial building located at 99 Tenth Avenue in Manhattan. There is an on-site Property Manager, Richard Bletsch, and an on-site maintenance staff consisting of three mechanics, Rashiek Barber, Kevin Roman, and Anthony Padron. Barber is the most senior employee at the building, having worked for 3-1/2 years at this location, and earns a higher hourly wage than the less senior maintenance staff.²

² Although Barber was issued a business card by the Employer that has the title "Maintenance Supervisor" printed on it, he is listed for payroll purposes as "Building Mechanic 1."

The Employer maintains all of the mechanical and electrical equipment in the building, either using its on-site maintenance crew or through the use of independent contractors, and also arranges cleaning services for the building.³ Property Manager Bletsch has sole authority to arrange and enter into contracts for maintenance services and supplies with outside vendors, although he testified that he has on occasion consulted with Barber when choosing between two vendors. The Employer's Senior Management includes Senior Vice Presidents Paul Winter and Kevin Clarkson.

Property Manager Bletsch has an office located on the 1st floor of the building and the maintenance staff has a work shop located on the 4th floor of the building. The 1st floor office has two computers, one of which is used by Bletsch exclusively and the other of which is used principally by Barber but also by all of the maintenance employees to sign in each morning. Either of these computers may be used to access the Employer's computerized work tracking and distribution system, known as Angus. There is also a computer in the 4th floor work shop with access to Angus, but that computer is currently out-of-service.

(B) Computerized Work Tracking and Distribution System

The maintenance work at the building falls into three principal categories: (1) standard tours of the building; (2) periodic preventative maintenance work; and (3) daily work orders that arise ad hoc as a result of tenant requests or because the maintenance staff notes necessary repairs in the course of their daily inspection of the building. Standard tours of the building and periodic preventative maintenance work are preprogrammed into Angus, while ad hoc work orders are entered into Angus as they arise. Each maintenance employee has a Blackberry that can receive work orders directly from Angus. Moreover, according to Barber, all of the maintenance employees have pass codes to access Angus and may enter work orders directly into the system.⁴ However, since the 4th floor computer ceased functioning, maintenance employees Roman and Padron generally convey work orders that come to their attention to Barber or Property Manager Bletsch, who then enters the work orders into Angus.

Although the record is somewhat vague regarding the precise content of each of the categories of maintenance work performed at the building, I will describe them to the extent permitted by the evidence. A "standard tour" is a list of building inspection tasks generated automatically by Angus based on a module that the Property Manager asked Barber to create because of his knowledge of the building. There are three standard tours each day, Tours A, B, and C, and each

³ The cleaning services for the building are provided by an independent contractor, and the cleaning staff is not employed or supervised directly by the Employer.

⁴ I note that when asked during cross examination whether employees Roman and Padron had access to Angus or could enter new work orders, Property Manager Bletsch was uncertain. However, it is undisputed that a computer with access to Angus was located in the maintenance employees' 4th floor workshop—albeit a computer that is currently out-of-order.

maintenance employee performs the tour that corresponds to his hours of work. The tours appear to be routine and are performed by the maintenance employees without specific instruction or oversight.

Periodic preventive maintenance tasks are also generated by Angus based on a module created by Barber and Property Manager Bletsch. Examples of preventative maintenance work include changing filters, snaking drains, replacing washers on plumbing fixtures, blow down of the boilers, servicing of the elevators, electrical work, and servicing of the HVAC system. Other periodic work includes alarm testing, generator testing, and annual cleaning of the water tanks. Unlike the standard tours, preventative and periodic maintenance is performed in part by the on-site maintenance staff and in part by independent contractors.

Ad hoc maintenance work in the building may include changing a ceiling tile, changing a light bulb, fixing a water leak, lubricating doors, and changing out automatic paper towel dispensers. Much of this work appears to be routine and according to Property Manager Bletsch can be performed by any of the mechanics "interchangeably."

(C) Hiring and Firing

Two employees have been hired since Property Manager Bletsch began working at the building in May 2006 and only one person has been fired. Specifically, in mid- to late- 2006, the Employer hired Angelo Evans after an extensive interview process, and discharged him a few months later for poor performance. Barber was present at one of Evans' interviews. In December 2006, Kevin Roman was hired. Barber referred Roman for hire and was present when he was interviewed. Barber testified that he was never told that he had authority to hire or fire employees, and it is undisputed that Barber does not possess such authority.

Property Manager Bletsch testified that Barber participated in Evans' and Roman's interviews, although he could not recall what if any questions Barber asked. Barber testified that he did not ask any questions during Roman's or Evans' interviews. Barber referred Roman to the Employer and was asked prior to the interview what kind of employee he felt would be able to assist in handling the work load, but he did not make any recommendations regarding whether the Employer should hire Roman and Evans. Bletsch asserted that Barber did recommend Roman's hire and explained that he approved the recommendation because "after I met with [Roman]...I thought he'd be a good candidate."⁵

⁵ With regard to Evans, Barber testified that he made no post-interview recommendation as to whether Evans should be hired. Property Manager Bletsch was not specifically asked whether Barber made a recommendation regarding the hire of Mr. Evans. He was asked whether there was any documentation of such a recommendation by Barber, and he stated that there was not.

Regarding Evans' discharge, Barber stated that he reported to Bletsch that Evans was lazy shortly before Evans was fired. Bletsch testified that decisions regarding whether to hire or discharge were made jointly by himself and his manager, Mr. Winter. Bletsch also testified that Barber recommended that Evans be let go, but Barber denied making any recommendation regarding Evans' employment status. Regarding the decision to discharge Evans, Bletsch stated that the decision was his own in discussion with his manager.

(D) Discipline

The Employer's regular disciplinary procedure is difficult to discern from the evidence presented at the hearing. Property Manager Bletsch testified that he discussed contemplated disciplinary action with Barber, and it appears that Barber co-signed at least some warnings and in one instance wrote up a warning. However, Bletsch admitted that his approval was required before a warning notice could be issued.

Most of the testimony regarding issuance of disciplinary warnings at the hearing concerned three Employee Warning Notices.⁶ While one such warning was signed only by Barber, Bletsch stated that his approval was necessary before any warning notice could be issued and was unable to recall why his signature did not appear on that warning. Although Bletsch testified that the warning was "initiated" by Barber, Barber explained that the warning came about after he brought to Senior Vice President Paul Winter's attention a complaint he received from a building security guard that maintenance employee Padron was impermissibly parked in the tenant's lot. According to Barber, Mr. Winter and Property Manager Bletsch instructed him to fill out a warning notice and sent him the necessary form to use.⁷

There was also a final warning issued to Kevin Roman in May 2008 for excessive absenteeism. Bletsch admitted that the document was prepared by him and issued by him, as Barber did not have access to the Employer's computerized official records regarding employees' attendance which were necessary to prepare the warning. Bletsch after discussing Roman's attendance problem repeatedly with Barber, talked about this issue with his manager at which point it was decided to issue the warning based on the history of Roman's attendance records. It

⁶ A warning dated 4-19-07 was issued to Anthony Padron for the same violation of company policy as an earlier warning that had been issued to him. The warning references previous warnings. Property Manager Bletsch wrote out this warning, although Barber's name appears in the box designated "Warning Given By" written in Bletsch's handwriting. Bletsch testified that the warning was issued by him and written up by him but that he discussed the warning with Barber. The warning is signed by both Barber and Bletsch, with Barber's name appearing first. Bletsch explained that he signed the warning when he and Barber delivered it to Padron.

⁷ Bletsch admitted discussing the warning with Barber. While he stated that he did not recall "directing [Barber] to write those specific words," that testimony is not inconsistent with Barber's own testimony that he put the warning in his own words after being instructed what it should say.

appears from the record that Barber had no input into the decision to issue Roman a final warning.

(E) Performance Evaluations

It is undisputed that Barber does not have authority to grant employees promotions, wage increases, or bonuses. Bletsch testified that Barber participated in employees' performance evaluations and that employee evaluations affect employee raises. Bletsch also testified that the Employer's new system of evaluating employees' performances requires that he and Barber select from a large array of different possible categories those that are applicable to the employees. Bletsch indicated that he and Barber then discuss the substantive aspect of the review and that he drafts the review with Barber's input. Bletsch stated that he will sometimes ask Barber to fill out the form and will then go over it and make any necessary changes. Thereafter the review is submitted to upper management, who may make further modifications, and then sent to Human Resources. Bletsch testified that a numerical rating is derived from the review for each category and that the average of the ratings in each category corresponds to a percentage increase in pay.⁸ There is no evidence in the record regarding who derives the numerical ratings in each category for which an employee is reviewed or how that rating is arrived at.

The record includes a document entitled "Performance Improvement Plan" (PIP) was issued to maintenance employee Padron in May 2007. There is no place on the form where any kind of numerical ratings are requested or indicated.⁹

(F) Assignment and Direction of Work

As indicated, all of the maintenance work in the building is dispatched through a computerized work tracking system called Angus. All of the maintenance employees perform a daily standard tour of the building which is generated as a list of inspection tasks by Angus and assigned to the maintenance employees according to their work hours. Barber works from 7:00 am to 4:00 pm, Roman works from 8:00 am to 5:00 pm, and Padron works from 9:00 am to 6:00

⁸ Bletsch stated that, as of this year, "[Human Resources] had a matrix. Based on your rating--there's a numerical rating that comes out of this. For each category there will be a number...from 1 to 5. That's totaled up and averaged at the end. Then you'll get an overall rating. From that, based on where you fall, there was a percentage increase."

⁹ It is clear that Barber discussed Padron's performance with Bletsch and provided substantial input regarding specific aspects of Padron's work. Both Bletsch's and Barber's signatures appear at the end of the first part of the form. Bletsch testified that, while Barber had "input to all of it" he did not draft any of the document. Barber did not recall preparing anything handwritten for Bletsch and no handwritten document was produced but testified that he never made recommendations regarding wage increases. Barber's handwritten comments do appear in "Progress Update Notes" section of the "Supervisor's PIP Documentation" portion of the form, but the "Final Review Evaluation" section, indicating that Padron has achieved the required improvement described in that portion of the form, was completed and signed solely by Bletsch. The record is unclear as to whether Barber ever made any recommendation affecting Padron's employment status or wages.

pm. Barber testified that these hours were established by Property Manager Bletsch, while Bletsch stated that they are jointly decided upon by him and Barber together. When an employee arrives at his scheduled arrival time, he receives a print out of the inspection list and begins his tour. It is not entirely clear from the record whether the list is the same for each tour. However, Bletsch testified that he may ask a mechanic to perform another mechanic's tour when the person assigned is absent and that no further instruction or oversight is necessary.

The record is unclear as to the distribution of other work. Both Barber and Bletsch enter ad hoc work orders into the system as they arise and dispatch them. Barber testified that the majority of the time Property Manager Bletsch generates the work orders because Padron and Roman will report needed work to Bletsch directly, unless he is unavailable. According to Barber, Bletsch also receives most of the called-in work orders. All of the maintenance employees have Blackberries and are able to receive work orders directly on their Blackberries.

Bletsch testified that Angus is preset to dispatch about 90 percent of the work orders received on a daily basis to Barber, with the remaining 10 percent of work orders being dispatched to Bletsch himself. Bletsch also testified that if Barber was tied up, he could dispatch a work order to one of the other mechanics instead. Barber testified that Bletsch dispatches about 60 to 70 percent of the work orders to him directly but that the other 30 percent of the work orders go directly from Angus to the other maintenance employees' Blackberries. Barber also testified that, because of his work load, he dispatches about 10 to 20 percent of the work orders he receives daily to Roman and Padron according to their availability, workload, and abilities.¹⁰ It is difficult to discern from the record whether these percentages refer only to ad hoc work that arises each day or whether they apply to all work, including preventative maintenance tasks that Angus generates on a periodic basis.

It is undisputed that some of the periodic and preventative maintenance work in the building is performed by outside vendors in accordance with contracts arranged and entered into by Bletsch. It appears that Bletsch and Barber work together in setting up the scheduling of periodic maintenance work, and Bletsch does consult with Barber about the frequency with which such work will be performed. Although Barber does not possess any authority to enter into contracts with outside vendors, he is authorized to contact vendors with whom the Employer has existing contracts when a periodic maintenance task is due to be performed or when supplies habitually provided by a vendor are needed. Bletsch testified that Barber has leeway to schedule periodic maintenance work with these outside vendors once Angus generates a notice that such work is due, but Bletsch also testified that he schedules outside vendors and notifies Barber of the schedule in

¹⁰ There is almost no evidence in the record regarding the relative skills and training of Padron and Roman. Barber testified that Padron knows the building better because of his longer tenure but that Roman has electrical skills which Padron lacks.

order that Barber can arrange an escort.¹¹ All vendors who perform work on the premises must be escorted, and Bletsch informs Barber when an escort is needed so that Barber can assign one of the maintenance employees. The assignment of an escort is based on availability.

With regard to assignment of overtime, all overtime must be approved by Bletsch except in cases of emergency. Although Bletsch initially testified that Barber could authorize overtime, he later admitted that Barber was required to consult with him and that he was required to sign off on any overtime in order for it to be paid. Barber testified that if he or any other mechanic does not finish a work order on schedule, he is required to notify Bletsch or upper management for approval to do overtime.¹²

Regarding the direction of work, it is undisputed that Barber checks Padron and Roman's work and tells them when something has been done incorrectly and how it can be corrected. However, it is also undisputed that Barber has never been disciplined for and is not evaluated in any manner on the quality of the work performed by Padron and Roman. Thus, Bletsch testified that although Barber is evaluated in part on his relationship with the tenant which could be adversely effected if the other mechanics are performing poorly, Barber is not held accountable for deficiencies in Padron and Roman's work.

II. Analysis

A. Supervisory Status

Before analyzing the specific duties and authority of the employee in issue, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

¹¹ There may also be occasional preparatory tasks that must be done before an outside vendor can perform specified work, for example draining the building water tank before the designated outside vendor performs periodic maintenance of the water tank.

¹² In addition, the Employer recently implemented a modified "On Call Policy," which Barber, Roman, and Padron were told to sign, that requires them to carry their Blackberries at all times and to respond whenever they are called to perform work at the building. Barber did not have any part in the creation of the Policy.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at n.8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the individual at issue here possesses any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Indeed, such “minor supervisory duties” should not be used to deprive such individual of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974)(quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4). In this regard, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists, here the Employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047(2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the

party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]hen the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusory statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006) and two companion cases, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (2006). In these decisions, the Board refined its analysis in assessing supervisory status in light of the Supreme Court’s decision in *Kentucky River, supra*. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s definition of Section 2(11) in the healthcare industry as being overly narrow by adopting “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood, supra*, slip op. at 3.

With regard to the Section 2(11) criterion “assign,” the Board considered that this term shares with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe the term “assign” “to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” *Id.* slip op. at 4. The Board reasoned that, “It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.” *Id.* The Board clarified that, “...choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” *Id.* Moreover, the Board stated that authority to assign did not comprehend ad hoc instruction to an employee to perform a discrete task. *Id.*

The Board defined the parameters of the term “responsibly to direct” by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986). In this regard, the Board quoted the following language from in *NLRB v. KDFW-TV, Inc., supra* at 1278:

To be responsible is to be answering for the discharge of a duty or obligation...In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he

directs...Thus in *NLRB v. Adam [&] Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department.” *Oakwood*, slip op. at 6 – 7.

In agreeing with the circuit courts that have considered the issue, the Board found that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.*, at 7.

In *Kentucky River*, the Supreme Court rejected the Board’s interpretation of “independent judgment” to exclude the exercise of “ordinary professional or technical judgment in directing less skilled employees to deliver services.” *NLRB v. Kentucky River Community Care, Inc.*, *supra* at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted a definition of the term “independent judgment” that “applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise....professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Oakwood*, *supra*, slip op. at 7. The Board noted that the term “independent judgment” must be interpreted in contrast with the statutory language, “not of a merely routine or clerical nature.” *Id.* slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* (citation omitted) However, “...the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.*

In applying the above-mentioned case law, and based on the record evidence, I conclude that the Employer has not met its burden to establish that Barber is a supervisor as defined by Section 2(11) of the Act. Contrary to the Employer’s assertions, the record does not establish that Barber exercises supervisory authority with respect to hiring, firing, discipline or reward of the other maintenance workers at 99 Tenth Avenue, or that he effectively recommends

such actions. Nor, for reasons discussed below, does the evidence suffice to establish that Barber responsibly directs these employees in the performance of their work or that Barber's assignment of tasks to these employees is anything other than routine.

For the most part, the Employer's assertions of supervisory authority are specifically contested by Barber. While it is undisputed that Barber had no authority to hire or fire employees, the Employer asserts, mostly through conclusory testimony and without offering any corroborative documentary support, that Barber nevertheless has an effective role in recommending hiring and discharge determinations. Although it is clear that Barber sat in on an interview of maintenance employee Roman and of former maintenance employee Evans and, in fact, initially referred Roman to the Employer, the evidence fails to conclusively establish that Barber played an active role in the interview process or made recommendations regarding hire based on these interviews. In fact, the record establishes that decisions regarding hire and discharge were made jointly by Bletsch and his manager Paul Winter, and the evidence suggests that the hiring decisions were not based on Barber's participation alone or even primarily.

Thus, in hiring Evans, the Employer conducted what Bletsch himself characterized as an "extensive interview process," yet Barber sat in on only one interview of Evans. Although Barber stated that he was asked prior to Evans' interview what kind of an employee he felt would be able to help with the workload in the building, the evidence fails to establish that he made any recommendation regarding Evans' ultimate hire let alone that the Employer relied on his input. Similarly, regarding the decision to hire Roman, Bletsch testified that he accepted Barber's recommendation of Roman because after he had met with Roman, he thought he'd be a good candidate. The evidence thus strongly suggests that the Employer's hiring decisions had an independent basis apart from Barber's input. *Cassis Management Corp.*, 323 NLRB 456 fn. 4 (1997) (superintendent not a supervisor in spite of his role in hiring, in part because management independently evaluated superintendent's recommendations by conducting personal interviews of applicants); see also *The Mower Lumber Company*, 276 NLRB 766, 766 fn. 2 (1985). The same is true of the Employer's decision to fire Evans for poor performance a few months after his hire. Although the firing occurred shortly after Barber reported to Bletsch his observation that Evans was lazy, the evidence does not conclusively establish that Barber made any recommendation as to what action should be taken and Bletsch ultimately admitted that the firing decision was made in discussion with his manager. Bletsch testified that he recommended the discharge and his manager concurred. The Board has long held that merely reporting conduct without any showing that an effective recommendation accompanied the report is not a sufficient basis for finding supervisory authority. See *Williamette Industries, Inc.*, 336 NLRB supra. at p. 744, citing *Ohio Masonic Home*, 295 NLRB 390 (1989).

The evidence likewise fails to establish that Barber had authority to discipline the Employer's maintenance employees or exercised independent judgment in that regard. Thus, Bletsch admitted that he prepared a warning to Roman for poor attendance himself because Barber had no access to employee attendance records and that he merely asked Barber to sign the warning at the time they delivered it to Roman. The fact that Bletsch may have discussed Roman's poor attendance with Barber prior to issuing the warning is insufficient to establish that Barber played any role in the decision to issue the warning, let alone exercised any kind of independent judgment regarding its issuance. Regarding the warning signed exclusively by Barber, the record similarly fails to show that Barber played anything other than a ministerial role. Barber simply conveyed a security guard's complaint regarding maintenance employee Padron to Bletsch and Winter and then followed their instructions in completing a warning notice. There is no evidence that Barber recommended the issuance of a warning or initiated it other than in the most reportorial sense; indeed, Winter and Bletsch forwarded the appropriate warning form to him and described to him what it should say. Cf. *Medtech Security, Inc.*, 329 NLRB 926, 928 (1999) (alleged supervisor's role in issuing warnings failed to establish supervisory status where alleged supervisor reported incidents to general manager and followed general manager's instructions in preparing warnings). The record is devoid of evidence of any warnings that resulted in personnel action without independent review by management. Accordingly, the evidence fails to establish that Barber played anything other than a reportorial and ministerial role in discipline. *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Pepsi-Cola Bottling Co.*, 154 NLRB 490 (1965).

The Employer's assertion that Barber's role in the Employer's reviews of employee performance demonstrates Barber's supervisory status is equally inapposite. It is well established that the ability to evaluate employees, without more, is insufficient to establish supervisory authority. This factor has been deemed unpersuasive in the absence of evidence that an employee's job was ever affected by such an evaluation. *Mount Sinai Hospital*, 325 NLRB 1136 (1998); *Williamette Industries*, supra. In the instant case, while Barber gave substantive input into the content of the maintenance employees' performance reviews and may have participated to some extent in drafting the reviews, the evidence is fatally vague with regard to the effect, if any, of Barber's input on the employment status of the maintenance staff. While Bletsch testified that the Employer has adopted a new evaluation system that requires him, in collaboration with Barber, to select appropriate categories on which to evaluate the maintenance staff and that these categories ultimately lead to a numerical ratings on the basis of which employee raises are calculated, there is no evidence in the record regarding who assigns the numerical values or how those values are derived.¹³ The evidence thus fails to establish that Barber exercises

¹³ The only documentary evidence in the record that may arguably relate to the employee performance reviews is a "Performance Improvement Plan" dated May 2, 2007. The document does not offer any place for a designation of numerical values at all. Although Barber did

any kind of direct effect on the employment status of the employees in whose reviews he has participated. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 538 (1999); *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); cf. *Bayou Manor Health Center, Inc.*, 311 NLRB 955, 955 (1993).

Finally, the Employer argues that Barber's assignment and direction of the work of the maintenance employees establishes his exercise of independent judgment indicative of supervisory status. I disagree. The Board has distinguished between routine direction or assignment of work and that which requires the use of independent judgment. *Laborers International Union of North America, Local 872*, 326 NLRB No. 56 (1998); *Azusa Ranch Market*, 321 NLRB 811 (1996). Only supervisory personnel vested with genuine management prerogatives should be considered supervisory, not straw bosses, lead men, setup men and other minor supervisory employees. *Baby Watson Cheesecake*, 320 NLRB 779, 783 (1995); *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970). Here, Barber stated that between 10 and 20 percent of the work orders he receives on a daily basis he dispatches to Roman and Padron depending on his own workload. It appears that these assignments are primarily on a task by task basis, and Barber's primary considerations in reassigning this work is the availability of the other maintenance workers and their abilities. The record fails to establish specifically what kinds of work Barber generally reassigns and contains little information about Roman's and Padron's particular skills, apart from the fact that Roman does electrical work while Padron does not. However, Bletsch himself stated that the average maintenance work could be performed pretty much interchangeably by either Padron or Roman. Taken as a whole, the evidence fails to establish that Barber's daily assignment of work orders to Padron and Roman is anything other than routine. *Meaden Screw Products, Co.*, 325 NLRB 762, 768 (1998) (assignment of employees did not require independent judgment where based on availability and which machine particular employees could and could not operation); see also *Volair Contractors, Inc.*, 341 NLRB 673 fn. 10 (2004).

The evidence does suggest that Barber has some role in creating "overall duties" of the maintenance staff, in that he developed the module that Angus uses to generate the standard building tours that he, Padron and Roman are required to perform daily. However, the evidence fails to establish that Barber was responsible for setting the daily schedule of tours, let alone assigning particular tours to particular employees.¹⁴ Moreover, the evidence strongly

complete a portion of this document in his handwriting, the Final Review Evaluation section of the form indicating that the employee has achieved required improvement was completed by Bletsch. There is no indication in the record how if at all the PIP effects an employee's employment status.

¹⁴ The record evidence regarding assignment and scheduling of overtime is equally inconclusive. Although Bletsch testified that Barber could assign overtime, Barber denied this. Moreover, Bletsch admitted that only he could "sign off" on overtime and stated that, except in cases of emergency, Barber was required to consult with him before assigning overtime. The evidence does not establish that Barber exercised independent judgment with regard to the assignment of overtime. See *McGraw-Hill Broadcasting Co., Inc.*, 329 NLRB 454 fn. 7 (1999) (evidence that

indicates that these tours are essentially routine in nature. Thus, Bletsch testified that no instruction or oversight was necessary in order for one employee to handle another's tour. See *Cassis Management Corporation*, 323 NLRB at 458 (assignment of work to porters and handyman found to be routine in part because they were able to perform this work essentially without instruction).

The evidence likewise fails to establish that Barber exercises independent judgment regarding the assignment of periodic and preventative maintenance work. As an initial matter, it is unclear how much of this work and what types of work are performed by the on-site staff and how much is done by outside vendors, let alone how much of the work done by the on-site staff Barber performs himself and how much if any he reassigns. Furthermore, the evidence fails to conclusively establish that Barber independently determines the scheduling of this work. On the contrary, it appears that Barber coordinates with Bletsch in developing the schedule, as it involves both the on-site maintenance staff as well as outside vendors. Barber's role with regard to work performed by outside vendors does not appear to involve independent judgment, as all the contracted-for work is arranged in the first instance by Property Manager Bletsch. Barber may contact outside vendors when periodic maintenance that they have been contracted by Bletsch to provide comes up, and he is responsible for assigning Roman or Padron to serve as an escort when these contractors are working in the building. However, the evidence indicates that the assignment of an escort is based on availability and does not involve independent judgment. *Meaden Screw Products, Co.*, 325 NLRB at 768.

The Employer nevertheless asserts that Barber should be deemed a supervisor based on his direction of the work of Roman and Padron. Although Barber does regularly check the work of the other maintenance employees and gives guidance in correcting it where necessary, the record is devoid of specific examples that would enable a determination as to whether this oversight requires Barber to exercise independent judgment. Even assuming such a finding could be made, however, it would not suffice under *Oakwood* to support a finding of supervisory status. The party asserting supervisory status must further show that the disputed supervisor may be held accountable for the inadequacies of the work he oversees, such that some adverse consequence to him may result from such inadequacies. The Employer has failed to make this showing. Indeed, Bletsch testified that inadequate performance by the maintenance staff has no direct impact on Barber's performance review and that Barber has never been disciplined for the poor performance of the maintenance staff. Cf. *Croft Metals*,

disputed supervisory employee could "request" overtime insufficient to establish supervisory status where evidence failed to establish that the employee whose status was at issue could "authorize" overtime).

Inc., supra, slip op. at 6. The evidence thus fails to establish that Barber meets the requirements for supervisory status on the basis of this indicium.¹⁵

Where the possession of any one of the aforementioned powers is not conclusively established or in borderline cases, the Board looks to well-established secondary indicia as background evidence on the question of supervisory status; however, these secondary indicia are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. *Training School of Vineland*, 332 NLRB 1412 (2000). Here the evidence of secondary indicia is equivocal at best. Thus, Barber appears to spend most of his time performing the same work as the rest of the maintenance staff, although he carries a heavier work load and may assist the other maintenance employees in the performance of their work because of his seniority and experience at the building. While Barber's business card has the title Maintenance Supervisor printed on it, Barber is identified as Building Mechanic 1 on the Employer's payroll. And, although Barber's hourly wage is higher than that of the less senior maintenance employees, he is not a salaried employee and is nonexempt for overtime purposes. All of the maintenance employees possess Employer-issued Blackberries and all have access to the second computer in the 1st floor office, although it is primarily used by Barber. In short, the secondary indicia here fail to lend support to the Employer's assertion that Barber is a 2(11) supervisor.

For the reasons explained above, I conclude that the Employer has failed to carry its burden to show that Barber was granted or exercised any authority that would make him a supervisor under Section 2(11). Therefore, in conclusion, the maintenance employee Barber shall be included in the following unit, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time maintenance mechanics employed by the Employer at 99 Tenth Avenue, New York, NY.

Excluded: All other employees, including office clerical employees, guards, professional employees, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the

¹⁵ Bletsch's testimony regarding the possible indirect impact of poor performance by the maintenance staff on tenant satisfaction, a factor that is reflected in Barber's evaluation, is speculative and was unsupported by any concrete examples of when if at all this had occurred.

Board's Rules and regulations.¹⁶ Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.¹⁷ Those eligible shall vote on whether or not

¹⁶ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

¹⁷ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **July 15, 2008**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

they desire to be represented for collective-bargaining purposes by Local 94, 94A, 94B, International Union of Operating Engineers.¹⁸

Dated at New York, New York
This July 8, 2008

/s/ _____
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

¹⁸ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **July 22, 2008**. The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.